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**FILED**  
**YOLO SUPERIOR COURT**

JAN 29 2010

By *[Signature]*

Deputy

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10 (530) 662-1940

11 Attorneys for Defendant  
12 MARCO ANTONIO TOPETE

13 SUPERIOR COURT OF CALIFORNIA  
14 COUNTY OF YOLO

14 THE PEOPLE OF THE STATE OF  
15 CALIFORNIA,  
16 vs.

17 MARCO ANTONIO TOPETE,  
18 Defendant.

) Case No.: 08-3355

) NOTICE OF MOTION AND MOTION FOR  
) PRETRIAL DISCOVERY COMPLIANCE  
) ORDER (PEN C §1054.5.)

) Date: : February 26, 2010  
) Time: 8:30 a.m.  
) Dept: 6

20 **TO: THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY:**

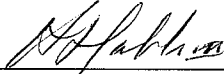
21 **NOTICE IS HEREBY GIVEN** that on the date and time indicated above, or on such  
22 date as the matter may be heard, Defendant MARCO TOPETE, by and through his attorneys  
23 Hayes H. Gable III and Thomas A. Purtell, will move that the Court compel discovery of the  
24 items previously requested informally of the prosecution on July 15, 2009, and not given to the  
25 defense. This motion will be based on the attached memorandum of points and authorities, the  
26 attached exhibits, all papers filed and records in this action, evidence taken at the hearing on this  
27 motion, and argument at that hearing.  
28

1 Dated: January 28, 2010

Respectfully submitted,

3 HAYES H. GABLE III  
4 THOMAS A. PURTELL

5 By:

  
6 HAYES H. GABLE III  
7 Attorney for the Defendant  
MARCO ANTONIO TOPETE

8 **AN INFORMAL REQUEST FOR DISCOVERY RELATING TO THE NOTICE**  
9 **OF FACTORS IN AGGRAVATION (PENAL CODE 190.3) HAS ALREADY**  
10 **BEEN MADE OF THE PRESECUTION AND THE PROSECUTION DID NOT**  
11 **DISCLOSE ALL REQUESTED ITEMS**

12 The defense is required to informally seek discovery at least 15 calendar days before  
13 asking for court-ordered discovery. (California Penal Code §1054.5(b) <sup>1</sup>.) In this case, the  
14 defense met that obligation. The defense submitted an informal discovery request for evidence  
15 relating to factors in aggravation by email to the District Attorney on July 15, 2009. A copy of  
16 that informal request is attached as Exhibit A. The prosecution provided an informal response via  
17 email on July 22, 2009. A copy of that informal response is attached as Exhibit B. In that  
18 informal response the prosecution agreed to partially comply with the request.

19 **THE DEFENSE ASKS THE COURT TO ORDER THE PROSECUTION TO**  
20 **DISCLOSE TO THE DEFENSE THE ITEMS LISTED BELOW.**

21 The prosecution did not disclose every item relating to evidence of factors in aggravation  
22 requested by the defense in its informal discovery motion. (Exhibit A.) The defense therefore  
23 requests that the court order the prosecution to disclose to the defense those items set out below,  
24 which were informally requested but not disclosed. The prosecution has only partially complied  
25 where noted.

26 **OTHER CRIMES/CONDUCT IN AGGRAVATION**

27 A. January 31, 1988

594 P.C.

Yolo ----

28 <sup>1</sup> All further references are to the California Penal Code, unless otherwise noted.

242 P.C. Woodland Police Dept.

148 P.C. 88-0781

The prosecution indicated that discovery regarding this conviction could be found on pages 2148-2160. This is a Social Study of the Probation Officer in the Juvenile Court for a hearing on February 23, 1988. The report refers to Woodland Police Department report numbers 88-0164 and 88-0781. Defense requests any and all evidence the prosecution intends to present in aggravation, including incident report numbers 88-0164 and 88-0781 as well as any the Yolo incident report.

**ORDER OF THE COURT: Granted \_\_\_\_\_ Denied \_\_\_\_\_**

**Ordered, with the following modification:**

B. May 19, 1988

459 P.C.

Yolo J-10063

Woodland Police Dept.

88-3530

The prosecution indicated that discovery regarding this conviction could be found on pages 2136-2147. This discovery contains a probation report which references Woodland Police Department report number 88-3530. Defense requests any and all evidence the prosecution intends to present in aggravation, including incident report Woodland 88-3530.

**ORDER OF THE COURT: Granted \_\_\_\_\_ Denied \_\_\_\_\_**

**Ordered, with the following modification:**

C. January 31, 1990

459 P.C.

Yolo J-10063

Woodland Police Dept.

90-846

The prosecution indicated that discovery regarding this conviction could be found on pages 2113-2116. This discovery contains a Supplemental Petition. No police documents are included, despite the reference to Woodland Police Department report number 90-846 in the prosecution's Notice of Factors in Aggravation. Defense requests any and all evidence the prosecution intends to present in aggravation, including incident report Woodland 90-846.

**ORDER OF THE COURT: Granted \_\_\_\_\_ Denied \_\_\_\_\_**

**Ordered, with the following modification:**

1 D. March 28, 1990

242 P.C.

Yolo J-10063

Woodland Police Dept.

90-2408

4 The prosecution indicated that discovery regarding this conviction could be found on  
5 bates pages 2117-2135. This discovery contains a probation report which references Woodland  
6 Police Department report number 90-2408. Defense requests any and all evidence the  
7 prosecution intends to present in aggravation, including incident report Woodland 90-2408.

8 **ORDER OF THE COURT: Granted \_\_\_\_\_ Denied \_\_\_\_\_**

9 **Ordered, with the following modification:**

10  
11 CONTINUING ORDER; COPIES OF ORDER TO BE GIVEN TO LAW  
12 ENFORCEMENT

13 The defendant requests that each of the above orders be continuing orders through the  
14 completion of trial, so that items granted that become available after the date of this order are to  
15 be made immediately available to defense counsel. This order is to be given to the prosecutor's  
16 investigator and to the police officer in charge of investigating this case, and those persons must  
17 immediately give all reports to the prosecutor, who must immediately give them to defense  
18 counsel.

19 **ORDER OF THE COURT: Granted \_\_\_\_\_ Denied \_\_\_\_\_**

20 **Ordered, with the following modification:**

21  
22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 The defense is entitled to disclosure of the prosecutor's penalty phase material under  
24 various legal provisions. In a capital case, "evidence...in aggravation" must be provided under  
25 Penal Code section 190.3. (See: *People v. Jennings* (1988) 46 Cal.3d 963; *People v. Matthews*  
26 (1989) 209 Cal.App.3d 155.) The 190.3 duties are self-executing and the prosecutor is obligated  
27 to provide notice of the *actual evidence* he or she intends to offer in aggravation, whether  
28 requested or not. (*Jennings*, 46 Cal.3d at 986-987; *Matthews*, 209 Cal.App.3d at 158, 161; but  
see *People v. Salcido* (2008) 44 Cal.4th 93, 156-158.)

1 "The fourth paragraph of section 190.3 provides the applicable rule ... 'Except for  
2 evidence in proof of the offense or special circumstances which subject the  
3 defendant to the death penalty, no evidence may be presented by the prosecution  
4 in aggravation unless notice was given to the defendant within a reasonable period  
5 of time as determined by the court, prior to trial.' Defendant was thus entitled to  
6 notice of the prosecution's intended aggravating evidence before the cause was  
7 called for trial or as soon thereafter as the prosecutor learned of the existence of  
8 the evidence." (*People v. Roldan* (2005) 35 Cal.4th 646, 733; citation omitted.)

9 In discussing "applicability of general principles of discovery regarding 'other crimes'  
10 evidence..." the California Supreme Court has stated, "we see no reason to dispute their  
11 applicability to the penalty phase of a capital case so long as the relitigation of the 'other  
12 crime'... is circumscribed by the bounds of relevance and admissibility of evidence that prevails  
13 in the original prosecution." (*People v. Breaux, supra*, 1 Cal.4th 281, 311, fn. 10; [*Breaux* was  
14 tried before Proposition 115]; see also *People v. Grant* (1988) 45 Cal.3d 829, 852-854.)

15 Penalty phase discovery is also available under Penal Code section 1054.1. (*People v.*  
16 *Superior Court (Mitchell)* (1993) 5 Cal.4th 1229.) "[W]e conclude that reciprocal discovery  
17 [Pen. Code §1054, et. seq.] is available with respect to penalty phase evidence, and that such  
18 discovery should ordinarily be made at least 30 days prior to the commencement of the guilt  
19 phase of the trial..." (*Id.* at 1231.)

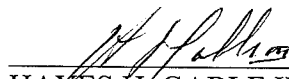
20 Penal Code section 1054.1 does not replace section 190.3. Also covered under Penal  
21 Code section 1054(e) is material discoverable under "**other express statutory provisions...**"  
22 Penalty phase disclosure is also constitutionally required. (*Brady v. Maryland* (1963) 373 U.S.  
23 83.)

24 Dated: January 28, 2010

Respectfully submitted,

HAYES H. GABLE III  
THOMAS A. PURTELL

25 By:

26   
27 HAYES H. GABLE III  
28 Attorney for the Defendant  
MARCO ANTONIO TOPETE